IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL WRIT PETITION NO. 169 OF 2007

RAMNIRANJAN KEDIA TOURISM &
SERVICES PVT. LTD. .. PETITIONERS

Versus

THE STATE OF MAHARASHTRA & ORS. RESPONDENTS

Mr. Girish Kulkarni with V.V. Khemka for petitioners

Mr. S.S. Pednekar, APP

Mr. Janak Dwarkadas with Mr. Nimesh Desai for R-2 & 3.

CORAM:-SMT. RANJANA DESAI &
ANOOP V. MOHTA, JJ.

DATED:-2/3/2007

P.C.

. The petitioners are the accused in CC No. 347/SS/2006 pending on the file of 44th Court of the Metropolitan Magistrate at Andheri, Mumbai. The 2nd respondent is the original complainant. The complaint is lodged under Section 138 read with 141 of the Negotiable Instruments Act.

2. On 25th August, 2006, the petitioners filed an application under Section 395(2) of the Code of Criminal Procedure ("Code" for short) stating that important questions of law arise in this case. It is averred in this application that there are conflicting judgments on the said questions. We may quote the said questions of law:

. "A) Whether criminal proceedings pending against Birla Global Finance Ltd. (Transferor Company) can be continued against Aditya Birla Nuvo Ltd. (Transferee Company) under Section 394(1)(b)(iii) of Companies Act, 1956?

. B) Whether criminal proceedings initiated by Birla Global Finance Ltd. (Transferor Company) can be continued by Aditya Birla Nuvo Limited (Transferee Company) under Section 394(i)(b)(iii) of Companies Act, 1956?"

3. The prayer of the petitioners was that in view of the conflicting judgments a reference may be made to this Court under Section 395(2) of the Code so that the above questions of law could be decided.

4. On 6/1/07 the learned Magistrate rejected the application. He observed that there is no propriety of making such application by the accused under Section 395(2) of the Code. He further observed that the principle laid down by the Supreme Court in **Bombay Offshore Services Ltd. v. Shankar Narayan & Ors., 2000 SCC (Cri.) 1385** is squarely applicable to the circumstances of the present case.

5. Being aggrieved by this order, the petitioners have approached this court.

6. We have heard at some length the learned counsel appearing for the petitioners. He submitted that the learned Magistrate erred in dismissing the petitioners' application holding that such an application cannot be filed by the accused. In this connection he relied on the judgment of the Supreme Court in **Sitaram Chhawehbaria & Anr. v. The State of Bihar & Anr., 1969 Supreme Court Decisions, 260**. He further submitted that indeed there are conflicting decisions on the questions involved in this case and it is necessary for this court to decide the said questions. He, therefore, submitted that the

impugned order be set aside.

7. We have also heard Mr. Dwarkadas, learned Senior Counsel appearing for the 2nd and 3rd respondents. Mr. Dwarkadas raised a preliminary objection that the application filed by the petitioners is not maintainable because an accused cannot file any application under Section 395(2) of the Code.

8. In this connection the learned counsel relied on the judgment of this court in **Shirish Suresh Weilling v. Sangeeta Avinash Marathe & Ors., (2001) 2 MLJ 94**, where this court has considered the scope of Section 395(2) of the Code. This court has observed as under:

. "First of all the Magistrate must satisfy himself that such a question has arisen in the case. Therefore, it is a matter not by merely raising that question by party to the proceeding. If the learned counsel’s argument is accepted, we are driven to a ridiculous position that any accused can make an application before the Magistrate alleging that particular Act under which he is prosecuted is invalid and scuttle the trial.

That is not the intent and purport of the section. The intention of the Legislature is to obviate the difficulty of the Magistrate or District Court in deciding the case before them. If the Magistrate feels or satisfied himself that the Act is invalid, he can invoke section 395 but it cannot be so readily invoked by merely demonstrating that the particular section is invalid".

9. In our view the present case is covered by the above judgment. A court can make a reference under Section 395(2) of the Code to this court only, if it is subjectively satisfied, that a case pending before it involves a question of law. The court's satisfaction is of the utmost importance. Even, if a party urges before a court that a question of law is involved, if the court is of the opinion, that no such question is involved, the court may not make a reference to this court. Besides the instant complaints are filed under Section 138 of the Negotiable Instruments Act. Under Section 143(3) of the said Act the trial court has to make an endeavour to conclude the trial within six months from the date of its filing. In our opinion, the questions raised by the accused can always be raised at the trial. We, therefore, feel

that it is not necessary to interfere with the impugned order.

10. In our opinion, reliance placed on the judgment of the Supreme Court on **Sitaram Chhawehbaria's case (supra)** is misplaced. In that case the Supreme Court was dealing with Section 432 of the Criminal Procedure Code, 1898 which is similar to Section 395(2) of the Code. The Supreme Court observed that the legislature has provided a special procedure for bringing a matter before the High Court when a party to a criminal prosecution pleads that the case involves a question as to the validity of an Act. The Supreme Court observed that the appellant therein did not apply to the trial Magistrate and approached the High Court and the High Court rightly declined to entertain the petition under Articles 226 and 226 of the Constitution, because the matter could be brought before the High Court according to the procedure prescribed by Section 432. There can be no dispute about this proposition. But after it is pointed out to the court that any question of law is involved, the court can make a reference to this court only, if it is subjectively satisfied that there is a question of law which needs to be

decided. The court may decline to make a reference, if it is not satisfied. The judgment in **Sitaram Chhawehbaria's case**, therefore, does not help the petitioners. In the circumstances, the petition will have to be dismissed and is dismissed acordingly.

11. We, however, make it clear that we have not expressed any opinion on the questions of law which are raised by the petitioners. The petitioners will be at liberty to raise those questions at any stage of the proceedings and, if raised the learned Magistrate shall deal with them independently and in accordance with law.

JUDGE.

JUDGE.